ACE POLYMERS (M) SDN BHD

v.

KETUA PENGARAH LEMBAGA KEMAJUAN IKAN MALAYSIA & ORS

HIGH COURT MALAYA, KUALA LUMPUR
MARY LIM J
[CIVIL SUIT NO: 21NCC-31-2011]
9 MARCH 2012

ADMINISTRATIVE LAW: *Exercise of administrative powers - Subsidiary legislation - Power and authority to enact subsidiary legislation - Whether matters concerning principles of public law - Whether action must be initiated by way of judicial review - Whether failure to adhere to strict procedural rules would render O. 53 of the Rules of the High Court 1980 redundant*

CIVIL PROCEDURE: *Costs - Security for costs - Whether amount ordered as security was reasonable - Whether there was ample evidence that plaintiff would not be able to settle first defendant's costs in event first defendant successful in defending claim*

It was the plaintiff's case that the first and second defendants had made oral and/or written representations or assurances on an Enactment and bringing into force of specific legislation for the mandatory use of fish crates and that the plaintiff would have the exclusive right to produce and supply the fish crates. Subsequently, the subsidiary legislation which provided for the specifications of the fish crates to be used was enacted *via* Peraturan-Peraturan Pemasaran Ikan 1973 [PU(B) 241]. However, the enforcement date of the subsidiary legislation was postponed several times and when it had in fact came into force, there was a change in the policy in the production and supply of the fish crates, such that the plaintiff was not the exclusive producer and supplier of the fish crates. The plaintiff claimed that by reasons of the defendants' breaches and/or omissions, it had suffered severe financial losses which eventually led to the winding-up of the plaintiff. The plaintiff therefore claimed for special damages, loss of profits, general damages, investment damages and exemplary damages. The second and third defendants filed an application in encl. 9 to strike out the plaintiff's statement of claim pursuant to

A O. 18 r. 19(1)(a), (b) or (d) of the Rules of the High Court 1980 ('RHC') and/or under the inherent jurisdiction of the court. The defendants contended that the challenge of the decision of the defendants was one which rightly should be by way of judicial review, and not by writ action, and hence the claim was plainly
B and obviously unsustainable and ought to be struck out. The plaintiff, however, submitted that its claim was based upon the tort of negligent misrepresentation and the tort of assumption of responsibility and thus its case was based on private law and not public law. The plaintiff also *via* encl. 16 appealed against the
C learned Senior Assistant Registrar's decision ordering the provision of RM90,000 as security for the first defendant's costs under s. 351 of the Companies Act 1965.

D **Held (allowing second and third defendants' application in encl. 9 with costs; dismissing appeal in encl. 16 with no order as to costs):**

(1) The essence of the plaintiff's complaints was about the defendant's actions in relation to the subsidiary legislation and how the plaintiff was not the exclusive producer and supplier
E of the fish crates. The power and authority to enact laws, including subsidiary legislation were patently matters concerning principles of public law. Hence the plaintiff's case against the second and third defendants was one which must be initiated by way of judicial review. The fact that the plaintiff had
F pleaded its claim against the defendants in tort of negligence, misrepresentation and the assumption of responsibility did not alter the consideration and finding. (paras 19 & 20)

(2) Even if it could be said that there was a mixture of public and
G private law in this case, the plaintiff's complaint's necessarily contained substantial elements of public law. The claim therefore fell squarely within the category of cases that must be brought by way of judicial review. (para 22)

H **(3)** The instant case involved matters of public law where specific procedure had been prescribed for such challenges. Thus, it was not up to the plaintiff to decide how it wanted to challenge the defendants. The rule must be adhered to strictly as it "is in the best interest of good administration", as
I otherwise O. 53 of the RHC would be rendered "redundant". *Ahmad Jefri Mohd Jahri v. Pengarah Kebudayaan & Kesenian Johor & Ors* (refd). (para 23)

(4) The bills of costs were not unrealistic estimation of the first defendant's costs as the issues of law involved in the claim were not issues routinely seen and were potentially complex. The plaintiff was a wound-up company. There was ample credible evidence that the plaintiff would not be in the position to settle the first defendant's costs in the event the first defendant was successful in defending the claim and was awarded costs after a trial on merits. (paras 29 & 30)

(5) Further, there was no co-relation between the plaintiff being wound-up and the allegations of breach and default on the part of the first defendant. The plaintiff was wound-up pursuant to some debts it owed to a third party and it was not connected to the first defendant. The plaintiff had also not made any efforts to contest or set aside, either the default judgment or the winding-up order. Hence, there was no evidence that the plaintiff's financial predicament was due to the first defendant. Accordingly, the sum ordered by the SAR was reasonable. (paras 39, 41 & 43)

Case(s) referred to:

Ahmad Jefri Mohd Jahri v. Pengarah Kebudayaan & Kesenian Johor & Ors [2010] 5 CLJ 865 FC ***(refd)***

Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd [1993] 4 CLJ 7 SC ***(foll)***

Dalian Dragon Leader Import & Export Co Ltd v. Ketua Pengarah Jabatan Perlindungan Hidupan Liar & Taman Negara & Ors [2012] 6 CLJ 143 HC ***(refd)***

Haidakota (M) Sdn Bhd v. Tan Tiam Chai & Another Appeal [2009] 1 CLJ 699 CA ***(refd)***

Interfood Sdn Bhd v. Arthur Andersen & Co & Anor [2009] 1 LNS 371 CA ***(refd)***

Keary Developments Ltd v. Tarmac Construction Ltd & Another [1995] 3 All ER 534 ***(refd)***

North Plaza Sdn Bhd v. United Securities Sdn Bhd [2010] 1 CLJ 470 CA ***(refd)***

Northampton Coal, Iron and Waggon Company v. Midland Waggon Company [1878] 7 Ch D 500 ***(refd)***

O'Reilly v. Mackman [1983] 2 AC 237 ***(refd)***

Sir Lindsay Parkinson & Co Ltd v. Triplan Ltd [1973] 2 All ER 273 ***(refd)***

Skrine & Co v. Mbf Capital Bhd & Anor & Other Appeals [1998] 3 CLJ 432 CA ***(refd)***

Legislation referred to:
Companies Act 1965, s. 351
Lembaga Kemajuan Ikan Malaysia Act 1971, ss. 3, 23
Rules of the High Court 1980, O. 18 r. 19(1)(a), (b), (d), O. 53

Companies Act 1985 [UK], s. 726(1)

For the plaintiff - Adam Abdullah (Fareez Zahir with him); M/s Adam Abdullah & Mani
For the 1st defendant - Raja Ahmad Mohzanudin (Nazatul Sheera with him); M/s Azmi & Assocs
For the 2nd & 3rd defendants - Khairul Fazly Kamaruddin SFC

Reported by S Barathi

JUDGMENT

Mary Lim J:

[1] The plaintiff is a company in liquidation. It was wound-up pursuant to an order of court made on 28 January 2010. The liquidator has sanctioned the initiation of this action.

[2] There are two applications before me: encls. 9 and 16. Enclosure 9 is the application of the 2nd and 3rd defendants to strike out the plaintiff's claim whereas encl. 16 is the plaintiff's appeal against the learned SAR's decision ordering the provision of RM90,000 as security for the 1st defendant's costs under s. 351 of the Companies Act 1965.

Salient Facts

[3] The plaintiff's claim relates to the production and supply of insulated fish crates for storing fish ("fish crates"). Pursuant to a letter dated 5 November 2003 copied to the 2nd defendant, the 1st defendant is alleged to have offered the plaintiff on terms, the exclusive right to produce and supply these fish crates. The plaintiff accepted the offer and took steps towards fulfilment of the terms set out in the letter of offer. It attended meetings and entered into joint-venture agreements with third parties for this purpose.

[4] At the same time, the 1st and 2nd defendants are said to have made oral and/or written representations or assurances to the plaintiff that laws providing for the mandatory use of these fish

crates by fishermen, fish importers, fish suppliers and other persons related to this industry will be enacted. The defendants are also alleged to have represented that the plaintiff will be the exclusive producer and supplier of these fish crates. In short, the legislation enacted will solely benefit the plaintiff.

[5] Relying on the defendants' representations, the plaintiff bought land; built a factory as well as appointed skilled directors and management personnel; sourced financing and bought equipment, all for the production of such fish crates. The plaintiff also claimed to have invested profits from its automobile business into this new business.

[6] The plaintiff's claim that the 2nd and 3rd defendants owe the plaintiff a duty of care to ensure that the legislation on the compulsory use of the fish crates be indeed enacted and enforced; and that the plaintiff did indeed have exclusive right to produce and supply these fish crates. In the statement of claim, these matters of "menguatkuasakan undang-undang tersebut dan penggunaan wajib kotak-kotak ikan tersebut serta pelantikan eksklusif plaintif sebagai pembuat dan pengeluar kotak-kotak ikan tersebut" are described as "tugas-tugas tersebut".

[7] The plaintiff alleged that Peraturan-Peraturan Pemasaran Ikan 1973 [P.U. (B) 241] gazetted on 21 September 2006 were enacted by the defendants for this purpose. This subsidiary legislation provided for *inter alia* the specifications of the fish crates to be used. However, the date for the coming into force of this subsidiary legislation was postponed several times.

[8] Around 9 March 2009, the 2nd defendant is said to have announced that the defendants would not be enforcing the compulsory use of the fish crates. Fishermen and others related to this industry were also allowed to source their supplies from any supplier. In other words, the plaintiff no longer had exclusive right to produce and supply these fish crates. The subsidiary legislation earlier mentioned has since been brought into force. Other suppliers are now said to benefit from the legislation. The plaintiff alleged that this change of policy and the non-enforcement of the subsidiary legislation were for political reasons.

[9] It is the plaintiff's claim that the defendants were in a special relationship with the plaintiff by reason of the "tugas-tugas tersebut". The 2nd and 3rd defendants are said to have assumed responsibility with regards to the "tugas-tugas tersebut". The plaintiff further claimed that the defendants knew or ought to have known that the plaintiff was relying fully on the powers, position and representations of the defendants in respect of the enforcement of the subsidiary legislation. In allowing other suppliers the right to produce and supply these fish crates, the plaintiff claimed that the defendants had acted contrary to their policies of encouraging Bumiputera companies like the plaintiff, and discriminated against the plaintiff.

[10] By reason of the defendant's breaches and/or omissions, the plaintiff claimed to have suffered such severe financial losses that led to the winding-up of the plaintiff. It now claims *inter alia* special damages of RM267,144,694; loss of profits of RM4 million per year since December 2009 from its automobile industry; general damages, investment damages and exemplary damages.

Enclosure 9

[11] The 2nd and 3rd defendants filed an application to strike out the plaintiff's statement of claim pursuant to O. 18 r. 19(1)(a), (b) or (d) of the Rules of the High Court 1980 and/or under the inherent jurisdiction of the Court.

[12] According to the 2nd and 3rd defendants, the claim against them as being vicariously liable for the acts or omissions of the 1st defendant is misplaced as the 1st defendant has legal capacity to be sued under Lembaga Kemajuan Ikan Malaysia Act 1971 (Act 49). Further, there is no reasonable cause of action against these defendants because the power to make relevant laws is one entirely within the power of the defendants. Finally, the challenge of the decision of the defendants is one which rightly should be way of judicial review and not, by writ action. That being so, the claim is plainly and obviously unsustainable and ought to be struck out with costs.

[13] Some preliminaries. The first issue concerning the 1st defendant is actually a non-issue. The 1st defendant is an individual sued in his capacity as the Director General of Lembaga Kemajuan Ikan Malaysia. While s. 3 of Act 49 confers legal capacity on the Lembaga to be used or to sue, there is nothing wrong with the 1st defendant, as the Director General of the Lembaga to be sued.

[14] In his submissions, learned Senior Federal Counsel for the 2nd and 3rd defendants argued that the 2nd defendant, as the Minister in charge of the Lembaga, has powers to enact Rules under s. 23 of Act 49. The essence of the plaintiff's claim relates to the 2nd defendant's purported oral/written representations to enact laws mandating the compulsory use of the fish crates; and the date for the coming into force of such laws in the event enacted. That being so, such a complaint against the 2nd defendant is actually a complaint against a public authority. Such complaints can only be properly and validly brought by way of judicial review. The procedure for such an application is to be found under O. 53 of the Rules of the High Court 1980.

[15] The plaintiff contended otherwise. The plaintiff submitted that its claim is based upon the tort of negligent misrepresentation and the tort of assumption of responsibility. Its remedy is in damages which it had set out in the appendix attached to the statement of claim. It is not seeking to review the decision of the defendants in not enforcing the relevant subsidiary legislation. Neither is it questioning the defendants' right to pass legislation. Its claim is private law and not public law based. In which case, this action is properly instituted.

Findings

[16] After reading the written submissions filed and after considering the oral submissions and the cause papers, I agreed with learned Senior Federal Counsel.

[17] When the whole of the plaintiff's claim is properly appreciated, it can be seen that the plaintiff's complaints against at least these defendants is predominantly housed in public law. The Federal Court in *Ahmad Jefri Mohd Jahri v. Pengarah Kebudayan & Kesenian Johor & Ors* [2010] 5 CLJ 865 has been

A unequivocal as to how such claims are to be handled and treated. The claim and the complaints must be brought by way of judicial review. This is not a matter of mere technicality but jurisdiction. In *Ahmad Jefri Mohd Jahri v. Pengarah Kebudayan & Kesenian Johor & Ors* p. 897-898, after having very carefully examined the leading B cases in this respect, the Federal Court observed and concluded that:

> ... a challenge on the use of appropriate procedure is very much fact-based. Thus, it is necessary for a judge when deciding on such a matter to first ascertain whether there is a public law C element in the dispute. If the claim for infringement is based solely on substantive principles of public law then the appropriate process should be by way of O. 53 RHC. If it is a mixture of public and private law then the court must ascertain which of the two is more predominant. If it has a substantial public law element then D the procedure under O. 53 RHC must be adopted. Otherwise, it may be set aside on the ground that it abuses the court's process. But if the matter is under private law though concerning a public authority, the mode to commence such action under O. 53 RHC is not suitable. Aside from this, there could be other circumstances like the kind in YAB Dato' Dr. Zambry. Much E depends on the facts of the case. But generally the court should be circumspect in allowing a matter which should be way of O. 53 RHC to proceed in another form. To say it is open to an applicant seeking judicial review to elect any mode he prefers, as implied in Kuching Waterfront, would, in our considered opinion, F be rendering O. 53 RHC redundant. This is certainly not the intention of the drafters of this rule who had a purpose in mind. When the purpose of this rule is in the interest of good administration, then this rule must be adhered to, except in the limited and exceptional circumstances discussed.

G **[18]** In the case of *Dalian Dragon Leader Import & Export Co Ltd v. Ketua Pengarah Jabatan Perlindungan Hidupan Liar & Taman Negara & Ors* [2012] 6 CLJ 143 Mohamad Ariff J similarly struck out the writ action on the basis that the proper procedure must be way of judicial review on policy grounds as expressed in H *O'Reilly v. Mackman* [1983] 2 AC 237. His Lordship opined that the objection raised by the Senior Federal Counsel was not merely technical but was an objection on jurisdiction:

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In a proper case, a non-reliance on Order 53 procedure can therefore constitute an abuse of process of the court. Where a suit raises a public law issue, it will be an abuse of process not to commence an action under Order 53. The reasoning underpinning this legal position has been aptly described by the Court of Appeal in *Dato' Seri Anwar Ibrahim* thus:

> This suit raises public law issues as it is a decision and action taken by the Prime Minister in pursuance of the provisions of the Federal Constitution that is being impugned. As such a decision taken by the Prime Minister with regard to a Minister as a Member of the Administration in his public duties is one which has implications for the public as a whole and it is in consequence of this that the public law is concerned with the decision-making process. The legal sources of the powers that are being impugned are in the public domain. As such to institute the proceedings by ordinary summons, though seemingly appearing to be simple in procedure, will deprive the public authority in this case the Federal Government and in the circumstances of the present case, of the protection of the law that it is entitled to by the processes available under Order 53.

[19] From the statement of claim and the affidavits filed, it is my view that the plaintiff's case against the 2nd and 3rd defendants is one which must be initiated by way of judicial review. The fact that the plaintiff has pleaded its claim against these defendants in the tort of negligent misrepresentation and the assumption of responsibility does not alter this consideration and finding. This is because of the facts and circumstances upon which this claim is founded. This will make it clearer.

[20] When the plaintiff's claim is pared down to its fundamentals, it become obvious that the essence of the plaintiff complaints is about the defendants' actions in relation to the subsidiary legislation and how the plaintiff is not the exclusive producer and supplier of the fish crates. The power and authority to enact laws, including subsidiary legislation are patently matters concerning principles of public law. Assuming for a moment that the 2nd defendant, as the Minister in charge of this portfolio did indeed make the representations alleged; the plaintiff's allegations will definitely call into scrutiny the 2nd and 3rd defendants' powers,

duties and responsibilities in relation to statute making; how and why those powers, duties and responsibilities are exercised or not exercised. Such a scrutiny necessarily involves issues of public law as law-making impacts the public even if it is alleged to be intended to benefit a single individual. More so now when the subsidiary legislation is in force and other suppliers' interests will be affected. In *O'Reilly v. Mackman*, Lord Diplock recognised that "there may be exceptions, particularly where the validity of the decision arise as a collateral issue in a claim for infringement of a right of the plaintiff arising under private law, or where none of the parties objects to the adoption of the procedure by writ or originating summons." In my view, the matters relating to the enactment and date of coming into force of the subsidiary legislation are not collateral but central or core issues here.

[21] I do not find the facts and circumstances of this pleaded case such as to warrant it to be an exceptional case where that rule of jurisdictional procedure can be departed from. This becomes more plain and obvious when the 3rd defendant, the Government of Malaysia is added to the equation. There is nothing specifically against the 3rd defendant save for being vicariously liable for the actions or representations purportedly made by one of its Ministers, the 2nd defendant.

[22] Even if it can be said that there is a mixture of public and private law in this case, it is my judgment that the plaintiff's complaints necessarily contain substantial elements of public law. It is difficult to see from the nature of the plaintiff's complaints how these complaints can be matters or issues concerning private law. The claim therefore falls squarely within the category of cases that must be brought by way of judicial review.

[23] This is also not a matter of the plaintiff's choice. It is not up to the plaintiff to decide how it wants to challenge the defendants in this regard. These are matters of public law where specific procedure has been prescribed for such challenges. This rule must be adhered to strictly as it "is in the interest of good administration". Otherwise, as the Federal Court said in Ahmad Jefri Mohd Jahri, O. 53 would be rendered "redundant".

[24] In the circumstances, this is a suitable and appropriate case to be struck out under O. 18 r. 19(1)(a), (b) and (d) of the Rules of the High Court 1980. This claim plainly and obviously ought to be struck out as decided in *Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd* [1993] 4 CLJ 7. The 2nd and 3rd defendants' application as found in encl. 9 is therefore allowed with costs of RM350.

Enclosure 16

[25] This is an appeal against the decision of the learned SAR who had ordered that the plaintiff provide RM90,000 as security for costs of the 1st defendant. This sum was to be paid within 14 days from 14 February 2012. The learned SAR further ordered that all further action against the 1st defendant be stayed pending provision of that security. In support of his application, the 1st defendant caused his solicitors to prepare a draft bill of costs which showed that the 1st defendant's potential costs to be in the region of RM350,000. The parties have filed affidavits and counter affidavits in relation to this application. These affidavits have been taken into consideration in coming to my decision.

[26] The relevant provision for consideration is s. 351 of the Companies Act 1965. It reads as follows:

> 351(1) Where a company is plaintiff in any action or other legal proceeding the court having jurisdiction in the matter may, if it appears by credible testimony that there is reason to believe that the company will be unable to pay the costs of the Defendant if successful in his defence, require sufficient security to be given for those costs and stay all proceedings until the security is given.

[27] This section provides the court with discretion as to whether or not to order that security for costs be provided by a company that has been wound-up. In *Skrine & Co v. Mbf Capital Bhd & Anor & Other Appeal*s [1998] 3 CLJ 432, the Court of Appeal was of the view that s. 351 "... provides for a two stage inquiry in the process of arriving at the conclusion as to whether security for costs should be awarded in a particular case in which the plaintiff is a company. The first step is for the court hearing an application in this regard to determine whether there is credible evidence. The second step is to ascertain whether that evidence, when found to be credible, supports the belief that the company

A will be unable to pay the costs of a successful defendant". This approach was followed by the Court of Appeal recently in *North Plaza Sdn Bhd v. United Securities Sdn Bhd* [2010] 1 CLJ 470.

[28] In *North Plaza*, the Court of Appeal expressed views similar
B to those first stated by Jessel MR in *Northampton Coal, Iron and Waggon Company v. Midland Waggon Company* [1878] 7 Ch D 500, 503, that the "fact of the plaintiff company being in liquidation would be sufficient 'reason to believe' the assets to be insufficient unless evidence to the contrary was given". Speaking for the
C Court of Appeal, Mohd Hishamudin JCA said at p. 642:

> Based on the above principle, and considering that the respondent had been wound up by the court, there is, therefore, reason to believe that the respondent would be unable to pay the costs of the appellant if the latter were to be successful in their defence –
D unless evidence to the contrary is given by the respondent. The inquiry then would be: has the respondent given any evidence to the contrary? We must say that we are unable to find any credible evidence to the contrary.

[29] The 1st defendant had prepared two draft bills of costs; one
E in anticipation of a striking-out application (approximately RM30,000), the other in relation to his costs upon completion of a full trial (approximately RM226,000). The 1st defendant has expressed prejudice and difficulties in recovering costs against the plaintiff in the event his defence is successful. In my view, having
F examined it, I find that these bills are not unrealistic estimation of the 1st defendant's costs. The plaintiff's monetary claim as expressed in the statement of claim is already fairly substantial. The issues of law involved in this claim are not issues routinely seen and are potentially complex. In any case, I observed that the
G plaintiff does not appear to suggest otherwise.

[30] Here, it is quite apparent that the two conditions mentioned in *Skrine & Co v. Mbf Capital Bhd* are undisputedly fulfilled. The plaintiff is a wound-up company. There is ample credible evidence
H that the plaintiff would not be in the position to settle the 1st defendant's costs in the event the 1st defendant is successful in defending the claim and is awarded costs after a trial on merits. As far as the corporate financial health of the plaintiff is concerned, it already has substantial debts in the region of RM145
I million. In fact, the plaintiff accepts that it will be unable to pay

the 1st defendant, if he is successful. There is therefore no credible evidence before the court that the plaintiff will be able to settle the 1st defendant's costs in the event he is successful in his defence.

[31] Generally, that would settle an application for security for costs under s. 351 of the Companies Act 1965. This is not one of those cases. It is the plaintiff's contention that the reason why it is in its present predicament, that it was wound-up is precisely because of the 1st defendant's default or breaches. But for the 1st defendant's defaults or breaches, the plaintiff would not be financially straitened or find itself wound-up. And, it is for those breaches and defaults that the plaintiff is now making its claim.

[32] The pertinent question to ask next is whether the court should consider any other factors once the two stage inquiry mentioned in *Skrine & Co v. Mbf Capital Bhd* have been met. The plaintiff referred to an unreported decision of the Court of Appeal in *Interfood Sdn Bhd v. Arthur Andersen & Co & Anor* [2009] 1 LNS 371 in support of its contention that the culpability of the defendant must be taken into consideration. What the plaintiff contended is that if the defendant was responsible for the plaintiff's financial predicament in the first place, the defendant must not be allowed to take advantage of the plaintiff's situation and insist on the provision of security for costs.

[33] In its judgment given orally in *Interfood Sdn Bhd v. Arthur Anderson & Co & Anor* the Court of Appeal echoed its earlier decision in *Haidakota (M) Sdn Bhd v. Tan Tiam Chai & Another Appeal* [2009] 1 CLJ 699 which reviewed "some of the principles that broadly guide the exercise of discretion" under s. 351 of the Companies Act 1965. Those guiding principles may be summarised as follow:

i. an application for security for costs must be made with sufficient promptitude after the issue of the writ;

ii. an order directing the provision for security should not generally be made where the making of it would be oppressive, especially where the plaintiff has an arguable case;

iii. such an order should not be made where there is an absence of *mala fide* on the part of the plaintiff in bringing the claim;

A iv. special attention should be paid to the balance between exposing an innocent defendant to the expense of defending a claim against shutting out a plaintiff from ventilating a genuine grievance.

B **[34]** After examining the circumstances in *Interfood Sdn Bhd*, the Court of Appeal found that one of the most important factors in the claim had been overlooked by the High Court. That factor was that the respondent had aided and abetted or assisted one of the directors to commit acts of breach of trust which led to C the appellant suffering loss. That being so, the appeal was then allowed.

[35] The Court of Appeal also recognised in *Haidakota (M) Sdn Bhd v. Tan Tiam Chai* that s. 351 of the Companies Act 1965 actually "confers a very wide discretion on the High Court to D order a company to provide security for costs in any action brought by it or against it". Quoting Lord Denning in *Sir Lindsay Parkinson & Co Ltd v. Triplan Ltd* [1973] 2 All ER 273, the Court of Appeal opined that "if there is reason to believe that the company cannot pay the costs, then the security may be ordered, E but not must be ordered." It is the circumstances of the particular case which will occasion the exercise or otherwise of this wide discretion.

[36] In this respect, I find the English Court of Appeal's decision F in *Keary Developments Ltd v. Tarmac Construction Ltd & Another* [1995] 3 All ER 534, helpful. Here, the Court of Appeal recognised Parliament's intent in enacting s. 726(1) of the Companies Act 1985 which is substantially similar to s. 351 of the Malaysian Companies Act 1965; that the exercise of discretion G under s. 726(1) is conditional on the court being shown that the company is one likely to be unable to pay costs awarded against it. The Court of Appeal further recognised the "balancing exercise" that the court has to carry out; balancing the injustice to a plaintiff pursuing a proper claim against a defendant who is unable H to recover the costs properly incurred in successfully defending the claim brought. But, there was something else that the Court of Appeal pointed out which I feel appropriate for the facts of this case. And, it is this – that the courts must "also be concerned

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not to be so reluctant to order security that it becomes a weapon whereby the impecunious company can use its inability to pay costs as a means of putting unfair pressure on the more prosperous company". A

[37] This is important for otherwise it would be somewhat easy and convenient for a wound-up plaintiff company who is unable to pay costs of a successful defendant to make such a claim and avoid payment. At the end of the day, the court will have to evaluate whether the claim of the plaintiff is devoid of bad faith and is genuine. When looking at the claim, the court must also have regard to the plaintiff's prospects of success. It must be impressed that the court is not, at this point, exploring the merits of the plaintiff's claim in detail "unless it can be clearly demonstrated that there is a high degree of probability of success or failure". At p. 540 of *Keary Developments Ltd*, the Court of Appeal further cautioned that "Before the court refuses to order security on the ground that it would unfairly stifle a valid claim, the court must be satisfied that, in all the circumstances, it is probable that the claim would be stifled". B C D

[38] With the concession of the plaintiff as to its liquidity, the focus here shifts to the 1st defendant, whether it is indeed true that it is his act or breach which placed the plaintiff in a financially straitened position. If the answer is in the affirmative, then the court may refuse or be less inclined to make the order sought. E F

[39] From the statement of claim and from the facts already set out earlier in respect of encl. 9 (the 2nd and 3rd defendants' application to strike out), the allegations against the 1st defendant are similar to those made against the 2nd and 3rd defendants. The plaintiff claimed that the 1st defendant had made oral and/or written representations on the enactment and bringing into force of specific legislation for the mandatory use of fish crates; and the appointment of the plaintiff as the exclusive producer and supplier of such crates. The 1st defendant is alleged to have failed to ensure that those representations are kept and met. When the date of coming into force of the subsidiary legislation was postponed several times for allegedly political reasons; and when there was a change in policy in the production and supply of the fish crates such that the plaintiff was not the exclusive producer G H I

and supplier of the fish crates; the plaintiff claimed that it suffered loss and damage. The 1st defendant is liable for the plaintiff losses because he is said to have known that the plaintiff had invested all its profits from its automobile business into that for the production and supply of the fish crates.

[40] All these allegations are denied and disputed by the 1st defendant. In particular, he denies having anything to do with the plaintiff's financial position.

[41] After carefully scrutinising the statement of claim and the affidavits filed, I do not find any co-relation between the plaintiff being wound-up and the allegations of breach and default on the part of the 1st defendant. The plaintiff was wound-up pursuant to some debts that it owed to some third party. That third party had sued the plaintiff in the High Court at Shah Alam (High Court Suit No. N. 4T5-22-703-2009) and had procured a judgment in default of appearance on 30 July 2009. There are no allegations made or evidence presented to show that those debts owed to the third party had anything to do with the 1st defendant. In fact, there is no evidence to show that the plaintiff had intimidated to the third party that it was unable to settle its debts because of the 1st defendant's acts; or that it was awaiting settlement of its debts by the 1st defendant before it could pay the third party. There is nothing to relate the two incidents together. The plaintiff has also made no efforts to contest or set aside, be it, the default judgment or the winding-up order. Yet, it alleges today that its present predicament is brought about by the 1st defendant. I find that extremely difficult to accept.

[42] I further do not find the plaintiff to have made a genuine arguable case. It is not as if with the subsidiary legislation the plaintiff is prohibited from producing and supplying the crates. On the contrary, I find present the observations made in *Keary Developments Ltd* that this court should not be "... so reluctant to order security that it becomes a weapon whereby the impecunious company can use its inability to pay costs as a means of putting unfair pressure on the more prosperous company". At the same time, I am satisfied that in ordering security to be provided, a valid claim is not being unfairly stifled as "... in all the circumstances, it is probable that the claim would be stifled".

[43] Accordingly, in balancing the interests of the two parties, I am compelled to find that the balance does not tip in favour of the plaintiff. There being no evidence that the plaintiff's financial predicament was ever due to the 1st defendant, the provisions of s. 351 operate. The decision of the learned SAR is therefore correct. The sum ordered is reasonable given the facts and I so dismiss this appeal with no order as to costs.

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